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Supreme Court of the United States

OCTOBER TERM 1970

No. 770

OWNERS OR PARTIES IN INTEREST:

ACHILLES C. PULAKOS, *Petitioner*

v.

REDEVELOPMENT AUTHORITY OF THE CITY OF ERIE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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September, 1970

THE LEGAL INTELLIGENCER, 69 NORTH JUNIPER STREET, PHILA., PA. 19107

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REDEVELOPMENT AUTHORITY OF THE CITY OF ERIE, *Respondent*

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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Petitioner prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Pennsylvania which quashed Petitioner's Appeal from a final order of the Court of Common Pleas of Erie County, Pennsylvania.

OPINIONS BELOW

The opinion of the Court of Common Pleas (R-423 to R-437) is not reported and appears as Appendix A hereof. The opinion of the Supreme Court of Pennsylvania (R-490 to R-491) is reported at 439 Pa. 157 and appears as Appendix B hereof.

References to the record are made according to the pagination assigned the record by the Supreme Court of Pennsylvania in its certification.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on July 2, 1970. A timely petition for reargument was denied on August 13, 1970. (Docket Entries, R-489). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

(1) Was Petitioner denied the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution where the Pennsylvania Supreme Court refused to entertain an Appeal filed on day late as the result of an unusual and unexplained delay in the United States mails over which Petitioner had no control while accepting appeals filed late as the result of error or omission on the part of other governmental agencies?

(2) Was Petitioner deprived of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution where the Pennsylvania Supreme Court quashed his appeal for late filing without an inquiry into the circumstances where in other cases that Court has accepted untimely appeals upon satisfactory explanation of the delay?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are contained in the Fourteenth Amendment to the United States Constitution. The Pennsylvania statutory provision involved is the Eminent Domain Code, Act of June 22, 1964, P. L. 84, Art. V, Section 523; 26 Purdon's Pa. Stat. Ann. 1-523 providing for appeal in condemnation cases to the Supreme Court of Pennsylvania.

STATEMENT OF THE CASE

This was a condemnation case initiated by Respondent Redevelopment Authority's declaration of taking (R-4) filed pursuant to the Pennsylvania Eminent Domain Code, 26 Purdon's Pa. Stat. Ann. 1-101, et seq. Petitioner, pursuant to the procedure required by the Eminent Domain Code, filed preliminary objections to the taking. (R-9 and R-13)

Petitioner's property fronts on State Street in Erie, Pennsylvania and is located in the commercial heart of the City and within an area of twelve square blocks which has been certified for redevelopment. (R-36) For more than fifty years Petitioner and his family have manufactured and sold fine chocolates and confections at this site and in fact the street address "926" has been Petitioner's trademark for years. (R-197) The business has been very successful and in recognition of this success the American Retail Confectioners Association in conjunction with Gannon College conducts at Petitioner's place of business the only school in the world that instructs in the science of candy making. Students regularly come from places as far as France, Italy, Greece and South America. (R-186) Over the years Petitioner has annually expended substantial sums for maintenance, repair and modernization of his facilities. (R-351)

Petitioner asserted that he was being treated arbitrarily by Respondent because his property was being condemned while another similar property also located within the same redevelopment project was scheduled for retention. Petitioner's property is shown in Block 31 of Condemnor's Exhibit 21 as being located on State Street and between two other parcels designated for acquisition. (R-414) The similar property designated for retention is shown in Block 25 of the same Exhibit as being located on State Street between two other parcels similarly designated for acquisition.

Petitioner contended that municipal agencies, including the Respondent Authority, had determined to build a motor hotel on a site which included Petitioner's property prior to the time the area was certified as blighted and prior to the adoption of a redevelopment plan as is required by the Pennsylvania Urban Redevelopment Law, 35 Purdon's Pa. Stat. Ann. 1701.

Petitioner asserted that the Respondent Authority was blinded to the complete implausibility of its plan and that the record proved that there could be no reasonable expectation that any motor hotel would ever be built on the site.

Petitioner argued that condemnation of his family business without a reasonable probability of a hotel being built would result in an unlawful and unjustifiable discrimination between himself and the property owner similarly situated and located only two blocks down the street.

Petitioner's preliminary objections were dismissed by the Trial Court on September 11, 1969. Petitioner filed a motion for rehearing with the Trial Court which was denied. (R-442) Since the Trial Court did not grant a rehearing, Pennsylvania Law requires that the time for taking appeal to the Supreme Court of Pennsylvania be computed from the date of the final order which in this case was September 11, 1969. *Francis v. Brashear School District*, 435 Pa. 589, 258 A. 2d 509 (1969).

The Pennsylvania Eminent Domain Code, 26 Purdon's Pa. Stat. Ann. 1-523, provides that an appeal may be lodged with the Supreme Court of Pennsylvania within forty-five days from the entry of a final order. Since the order dismissing Petitioner's preliminary objections was entered September 11, 1969, Petitioner's time for appeal expired October 26, 1969, but since that date was a Sunday the time was extended to October 27, 1969, by virtue of the Statutory Construction Act, 46 Purdon's Pa. Stat. Ann. 538.

On October 23, 1969 Petitioner's Counsel mailed the required appeal form, certified mail from Erie, Pennsyl-

vania to the Prothonotary of the Supreme Court of Pennsylvania, a distance of approximately 130 miles. (R-504 to R-506)

By letter dated October 28, 1969 the Prothonotary's Office advised Petitioner's Counsel of the receipt of the letter of October 23, 1969 and the entry of the appeal but did not advise him either of the date the letter with its enclosures was received or the date the appeal was actually docketed. (R-507) Petitioner and his Counsel assumed all was well.

The record for the Trial Court (R-1 to R-450) and briefs for Petitioner and Respondent (R-451 to R-488) devoted to the merits of the controversy were printed and filed with the Prothonotary. Subsequently, on March 19, 1970, Argument on the merits was heard before the Pennsylvania Supreme Court. (R-489) The issue of late filing was not raised by Petitioner, Respondent, the Prothonotary or by the Court. Numerous questions were posed with respect to the merits of the case.

On July 2, 1970 the Supreme Court of Pennsylvania issued its opinion. (App. B) Petitioner's appeal was quashed for late filing without mention of the merits of the case. For the first time, and eight months after the appeal was filed, and after the expenditure of much time and money, both Petitioner and Respondent discovered that the appeal had been docketed one day late. Petitioner timely filed a petition for reargument with supporting affidavits which set forth the circumstances of the filing of the appeal. (R-492) On August 13, 1970, the request for reargument was denied. (R-489)

The appeal form was mailed October 23, 1969, certified mail, to a point 130 miles from the place of deposit under circumstances where normal delivery is overnight. Postal officials are at a loss to explain a delay of four days in delivery except that the letter may have been missorted into fourth class mail, and remained undetected for several days. (R-494, 495)

REASONS FOR GRANTING THE WRIT

I. Refusal to Hear Appeal Untimely Filed as Violative of Equal Protection

The Supreme Court of Pennsylvania has held on numerous occasions that compliance with statutory provisions granting the right of appeal go to the jurisdiction of the Court and that the Court is "without the power to enlarge or extend the time provided by statute for taking an appeal. . . ." *Commonwealth v. Bey*, 437 Pa. 134, 137, 262 A. 2d 144, —— (1970). See: *Commonwealth v. Simon*, 413 Pa. 609, 198 A. 2d 583 (1964) and *Commonwealth v. Mackley*, 380 Pa. 70, 110 A. 2d 172 (1955).

Nevertheless, there are exceptions to this rule. In *Nixon v. Nixon*, 329 Pa. 256, 198 A. 154 (1938), appellant appealed a judgment of a trial judge to the Pennsylvania Superior Court, an intermediate appellate court, which affirmed the judgment of the lower court. Although the Prothonotary of the Superior Court was not bound by statute or rule of court to mail notices of decisions of the Superior Court, it was his custom to do so. On this occasion he did not mail the notice of decision. Consequently, appellant did not learn of the decision until it was published in the Advance Reports and by then his time for appeal to the Pennsylvania Supreme Court had expired. The Court held that although the Prothonotary was under no statutory obligation to give notice, his custom of doing so excused appellant's untimely appeal. The Supreme Court said:

> "Neither appellant nor his counsel knew, nor had any reason to believe, there had been a mistake in the prothonotary's office. Under the circumstances they were entitled to expect this notice. The Harrisburg District is composed of twelve counties, and the opinions on cases arising there are handed down at various places at which the court sits, usually cities other than Harrisburg. Counsel lives in Adams County, and

> it would impose too great a burden to require him to daily inform himself by telephone. Appellant, through his attorney, was lulled into security by this practice, and his failure to receive such notice is a sufficient reason for us to hold that appellant should be permitted an appeal. To hold otherwise would work a grave injustice." *Nixon v. Nixon*, 329 Pa. 256, 261, 198 A. 154 (1938).

The effect of the Court's holding was to allow an appeal although untimely filed where the cause of the delay was out of the control of the litigant. The facts of the present case are remarkably similar. An appeal was mailed to the prothonotary of the Supreme Court of Pennsylvania, a distance of 130 miles, well in advance of the deadline and well within the period of normal mail delivery. As the result of unexplained and unusual delay in delivery, the appeal was filed one day late. Counsel was notified by the prothonotary that the appeal was filed but was not informed of the day of filing or that the time for appeal had expired. Briefs were prepared and printed and the case argued, all without mention of the late filing. Nevertheless, Petitioner is denied an appeal in a case involving substantial property rights. Petitioner believes this refusal to consider the merits to be a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

It is true that a State is not required to provide appellate review but once an appeal procedure is established "it must be kept free of unreasoned distinctions that only impede open and equal access to the Courts". *Rinaldi v. Yeager*, 384 U.S. 305, 310-311, 86 S. Ct. 1497, 1500. See also: *Williams v. Oklahoma City*, 395 U.S. 458, 89 S. Ct. 1818.

This Court has held that:

> "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the in-

> terests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 10.

See also, *Kramer v. Union Free School District*, 395 U.S. 621, 89 S. Ct. 1886; *Baxstrom v. Herold*, 383 U.S. 107, 86 S. Ct. 760. Petitioner believes that the Pennsylvania Supreme Court has made an "unreasoned distinction" between the appellant in *Nixon v. Nixon*, supra, and petitioner and that the distinction cannot prevail when measured against the test of *Williams*.

The interest the State claims to be protecting is finality of judicial action. *Nixon v. Nixon*, supra. The Court in that case carved out an exception for a litigant disadvantaged by a custom of the prothonotary and the fact that it would be too great a burden to require counsel who lives a distance from the courthouse to obtain information by telephone. The basic fact is that the decision of the Pennsylvania Supreme Court in the present case requires counsel to no longer utilize the mails and instead drive great distances to file papers, with an attendant unnecessary and unreasonable expense to the client. Furthermore, the Petitioner herein had no more control over the mails than the appellant in *Nixon* had over the prothonotary. The interest of the State is far outweighed by the loss sustained by the Petitioner by the taking of his property and lifetime business without a full hearing on the merits of his case.

II. Failure to Inquire into the Circumstances of An Untimely Filed Appeal as Violative of Due Process

The question of an untimely filed appeal was not raised at any time during argument of the case. Petitioner and Respondent briefed and argued only the merits. The Court did not raise the issue. Argument took place on March 19, 1970, nearly five months after the appeal was

filed and after Petitioner had gone to great expense in preparing for his appeal. Subsequently, on July 2, 1970, eight months after the appeal was filed, an opinion was issued quashing the appeal without a discussion of the merits. The Court's opinion indicates that the Court did not know when the appeal form was mailed. (App. B) Nevertheless, without any inquiry into the facts surrounding the filing of the appeal form, the appeal was quashed even though the Court in *Nixon* recognized that an opportunity to satisfactorily explain delay should be afforded. It is true that Petitioner's Counsel filed a motion for reargument explaining the delay. Nevertheless, eight months had passed since the filing of the appeal and it was therefore impossible to determine what had happened either at the Post Office or at the office of the prothonotary of the Court. In any event, Petitioner's Counsel had only ten days to file the motion for reargument and in that time it was necessary to travel to Pittsburgh to make inquiries at the Post Office and at the Court, prepare the motion for reargument and guarantee its filing at Pittsburgh within the time limit. *Rule 71, Rules of the Supreme Court of Pennsylvania.*

Petitioner believes that to deny his appeal for late filing without an inquiry into the circumstances where exceptions previously have been carved out is such "an arbitrary action of government" as to deprive Petitioner of property without due process of law. *Twining v. New Jersey*, 211 U.S. 78, 29 S. Ct. 14.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

KNOX, GRAHAM, PEARSON, McLAUGHLIN & SENNETT

BY: William W. Knox, Esquire
Edwin L. R. McKean, Esquire

APPENDIX A

OPINION OF THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA

CARNEY, P. J.

This matter is before the court on preliminary objections filed on behalf of Achilles C. Pulakos, the owner of the property located at 926 State Street, Erie, Pennsylvania. The objections are made to the declaration of taking by the Redevelopment Authority of the City of Erie under the provisions of Sec. 406 of the Eminent Domain Code of the Commonwealth of Pennsylvania. The owner, and his grandfather and father before him, have been engaged in the manufacture and sale of candy at the location in question since approximately 1915, and are members of one of the most prominent and respected families in the community.

In the brief filed on behalf of the owner, and at the oral argument held before this court, his opposition to the condemnation is based upon the following preliminary objections.

(1) That the area (generally bounded by West 6th Street and South Park Row on the north, French Street on the east, Tenth Street on the south, and Sassafras Street on the west) certified as blighted by resolution of the City Planning Commission dated October 30, 1962, is and was not, in fact, blighted within the meaning of the Urban Redevelopment Law of Pennsylvania.

(2) That the planning division's certification of blight was arbitrary.

(3) That the authority acted arbitrarily in condemning the property of the owner.

(4) That the planned re-use of the property in question, i.e., transient housing, does not have a reasonable probability of fulfillment.

Findings of Fact

(1) The Redevelopment Authority of the City of Erie is a duly organized and existing authority under the terms of the Urban Redevelopment Laws of Pennsylvania, the Act of May 24, 1945, P. L. 990, Sec. 1 et seq., as amended.

(2) That the City Planning Commission of the City of Erie, by resolution dated October 30, 1962, certified within the meaning of said Urban Redevelopment Law, a certain area generally bounded by West Sixth Street and South Park Row on the north, French Street on the east, Tenth Street on the south, and Sassafras Street on the west, as a redevelopment area. Said area has commonly become known as "Downtown Erie Urban Renewal Project Area."

(3) That the Downtown Erie Urban Renewal Project Area is a blighted area within the legislative requirements of Section 2 of the Urban Redevelopment Laws of Pennsylvania, Act of May 24, 1945, P. L. 990, Sec. 1, 35 P. S. 1701.

(4) That by appropriate action the Redevelopment Authority of the City of Erie has condemned the premises known as 926 State Street, Erie, Pennsylvania, owned by Achilles C. Pulakos.

(5) The Authority exercised reasonable efforts to relocate owner's business to other locations within the Project Area despite the lack of legal compulsion on the part of Authority to do so.

(6) That there is no evidence before the court to indicate that the City Planning Commission was motivated by fraud, palpable bad faith, arbitrariness or caprice in certifying that the area in question was blighted.

(7) That the Authority reasonably relied on expert opinion in its determination on that owner's property should be required.

(8) That there is no evidence before the court to indicate that the Authority acted fraudulently, arbitrarily, capriciously or in bad faith in condemning the property of the owner.

Discussion

The first matter for our determination is whether or not the area in question is blighted.

Section 2(a) of the Urban Redevelopment Act defines the requirements for blight, and it reads as follows.

> "(a) That there exist in urban communities in this Commonwealth areas which have become blighted because of the unsafe, unsanitary, inadequate or overcrowded condition of the dwellings therein, or because of inadequate planning of the area, or excessive land coverage by the buildings thereon, or the lack of proper light and air and open space, or because of the defective design and arrangement of the buildings thereon, or faulty street or lot layout, or economically or socially undesirable land uses."

On appeal, and where the circumstances constituting blight are denied, the burden is on the Authority to prove, in fact, that blight does exist. *Faranda Appeal*, 420 Pa. 295, 302. However, it is not necessary that each and every one of the conditions thus specified in the statute should exist. The presence of any one of them is sufficient to warrant such certification and the adoption of a redevelopment project. *Oliver (et al. Appellant) v. Clairton*, 374 Pa. 333, 340. Furthermore, the area must be considered in its entirety and not in its unseverable parts. The fact that one small part was free from blight would not render the Authority's determination arbitrary, for it is the purpose of an authority to deal with an area rather than individual properties. *Crawford v. Redevelopment Authority*, 418 Pa. 549; *St. Peter's v. Urban Red. Authority of Pgh.* 394 Pa. 194.

Charles A. Reeve was called as an expert witness by the Authority, and gave testimony as to the nature of the area in question. In fact, his was the only expert testimony offered in this regard by either side. Mr. Reeve characterized himself as a city planner and consultant, one who had

previously been employed as a planner by the Authority in connection with the Liberty-Sassafras Urban Renewal Plan, and later as director of planning for the City Planning Division of the City of Erie.

With regard to the criteria of blight set forth in the Redevelopment statute, Mr. Reeve testified as follows:

1. ". . . There are a number of dwelling units that existed in the downtown Erie urban renewal project on the second and third floors of structures located over commercial or other non-residential uses. By personal inspection of the exterior of these structures and knowledge of inspections made by others of the interiors, they are by accepted planning criteria unsafe, unsanitary, inadequate or over-crowded. Unsafe refers to situations where stairs might be broken, being a hazard to personal injury; wiring might be overloaded, being a hazard to fire or something of that nature; unsanitary may be inadequate or unworkable plumbing facilities; inadequate refers to the space available for family living generally, and related to over-crowding, there being too many families for the number of rooms available."

2. That the area had been inadequately planned because

". . . This entire area was developed at a time when there was little if any planning, and like Topsy it just grew, and because of this it is just a collection of things without any particular rhyme or reason. . ."

3. That there were mixed uses in the area:

"Yes, as I mentioned previously, there are uses where you have residential uses above commercial uses. We find some manufacturing uses involved in the downtown business district."

4. With regard to excessive land coverage:

"Our studies indicate that in the downtown area some parcels are covered one hundred per cent by structures, to the exclusion of any open space on the

side. Continuing, the next clause says: '. . . or the lack of proper light and air and open space.' This relates in a sense to the former, because a lot that is built up one hundred per cent with a structure, and where the adjoining structures also abut right against it, it limits light and air to the property, and in a downtown area where all the land is built up, there is a lack of open space other than that which is used for traffic."

5. Relative to defective design:

". . . 'Because of the defective design and arrangement of the buildings thereon.' We found in a number of cases that buildings were designed or had been remodelled to the extent that—well, we did find buildings where the upper floors were unusable by reason of the design or arrangement; that they were sealed off, vacant, and were potential hazards from fire or other problems."

6. Relative to faulty street on lot layout:

"The downtown area has a gridiron street system, which we found generally to be all right in terms of future use; however, many of the streets were narrow and would require widening to accommodate modern day traffic. The lot layout in many cases represented long narrow lots of less than twenty-five feet in width, which are unusable or difficult to develop properly in contemporary development."

7. Regarding economically or socially undesirable land use:

"These relate to the use of downtown land where your primary concern is retail-business office uses, the type of uses typically associated with a central business district. Where land or building space is used for residential use, it deprives you of that use for those purposes, or manufacturing or other uses that would be better located elsewhere."

This testimony was neither rebutted by contradictory evidence nor weakened by cross examination. The ques-

tion of blight was raised for the first time in the brief and oral argument of counsel for Mr. Pulakos. This, despite the fact that the City Planning Commission's resolution depicting this area as blighted was dated October 30, 1962, and that City Council acknowledged the same to be true in their resolution of February 12, 1965. Many old and decrepit buildings, some in the same block as Mr. Pulakos' property, have been removed as the result of this project. We believe that the conditions outlined by Mr. Reeve did, and in some instances, still do exist, and we so find.

Mr. Pulakos then contends that both the City Planning Commission and the Redevelopment Authority were arbitrary, the former in its certification that the area was blighted, and the latter in condemning and marking for acquisition the owner's property.

The *Farada Appeal*, supra, indicates that where the matter of blight is contested that the court must make a factual finding in this regard, which we have done. However, in *Schenck v. Pittsburgh et al.*, 364 Pa. 31 (1960) where a similar argument was made the court seems to indicate that our scope of review is somewhat more limited, and that we need only determine that the involved agency acted in good faith. At page 35, the court said:

> "In the absence of any indication that the Commission did not act in good faith or was wholly arbitrary in certifying the area designated by it as blighted, its certification to that effect is not subject to judicial review. Among the conditions enumerated in the Urban Redevelopment Law as constituting a 'blighted' area are 'inadequate planning of the area', 'excessive land coverage by the buildings thereon', 'defective design and arrangement of the buildings thereon', 'faulty street or lot layout', and 'economically or socially undesirable land uses'. Such conditions were found by the City Planning Commission to exist . . . the existence of these conditions brings the situation clearly within the scope of the Urban Rede-

velopment Law, and, since that Act gives the Power of Eminent Domain to the Urban Redevelopment Authority, it is for that agency, and not for the courts, to determine whether or not the power should be exercised in this particular instance. It has been held in many cases that where the Right of Eminent Domain is vested in a municipality, an administrative body, or even a private corporation, the question as to whether the circumstances justify the exercise of the power in a given instance is not a judicial one, at least in the absence of fraud or palpable bad faith."

See also *Crawford v. Redevelopment Authority, Aplnt.*, 418 Pa. 549 (1965) 554, where it was stated:

> "The power of discretion over what areas are to be considered blighted is solely within the power of the Authority. The only function of the courts in this matter is to see that the Authority has acted not in bad faith; to see that the Authority has not acted arbitrarily, to see that the Authority has followed the statutory procedures in making its determination; and finally, to see that the actions of the Authority do not violate any of our constitutional safeguards. Within this framework then, we must examine the plaintiff-appellee's assertions and evidence, and the action of the court below."

Applying this to the matter before us it is our opinion that the record is completely devoid of evidence that would in any way indicate that the City Planning Commission acted either in bad faith or arbitrarily. In fact, the testimony indicates just the opposite, that the Planning Commission was an organization of high-type, community-minded individuals whose only aim was to revitalize the downtown section and thus contribute to the overall development of the city. They relied not only on the expert advice of their chief planning director, Mr. Reeve, and his staff, but according to its resolution of October 30, 1962,

made a preliminary study of the area and its members conducted a full inspection before reaching their conclusion. These members were business and professional men who had a knowledge of this area, gained through years of personal observation. That they acted not only in good faith, but with intelligence, is borne out by the fact that every agency or governmental body that later considered this project, city, county, state and federal, corroborated the conclusion of the Commission that the project area was in fact blighted. We find the contention of the owner in this regard a mere bald assertion, completely devoid of merit and completely without factual basis. In any event, we have, as previously noted, found that the area was blighted under the requirements of the Act. This would make any further argument in this regard purely academic.

While both *Schenck v. Pittsburgh, et al.* and *Crawford v. Redevelopment Authority, Aplnt.* supra, concerned the certification of blight by a commission or authority the principles propounded by the court apply with equal vigor to the owner's fourth contention that the Authority acted arbitrarily in condemning this property.

This is borne out by the statement of the court in *St. Peter's v. Urban Red. Auth. of Pgh.*, 394 Pa. 194 at 197.

> "And it is generally settled that unless bad faith, arbitrary action, or failure to follow a statutory requirement are shown, the certification by an authority that an area is blighted *and the plan for improving it are not subject to judicial review: Schenck v. Pittsburgh*, 364 Pa. 31 (1950); *Oliver v. Clairton*, supra, 374 Pa. 333 (1953); *Lazrow v. Philadelphia Housing Authority*, 375 Pa. 586 (1954); *Blumenschein v. Pittsburgh Housing Authority*, 379 Pa. 566 (1954)." Emphasis ours.

And again, in *Faranda Appeal*, 420 Pa. 295, 299:

> "In sustaining the lower court's dismissal of this objection, we are mindful of the words of this court

in *Blumenschein v. Pittsburgh Housing Authority*, 379 Pa. 566, 572, 573, 109 A. 2d 331: '. . . By a host of authorities in our own and other jurisdictions (citing cases) it has been established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will not inquire into the wisdom of such actions or *into the details of the manner adopted to carry them into execution*. . .' (emphasis supplied) in the absence of a showing of any fraud, abuse of discretion or bad faith. . ."

This record is replete with evidence that Mr. Pulakos' property was not singled out by the Authority through any ulterior motive, but that the property, as was the adjoining properties, earmarked for condemnation for planning purposes in every plan, survey or study made of this redevelopment area. Mr. Reeve testified that at the time he first came to Erie in 1961 one Maurice Roteval was then completing a conceptual plan for the City of Erie; that one of the key points of the Roteval plan was transient housing and that the Pulakos property was even then earmarked for acquisition.

Following the Planning Commission's finding that the area was blighted this was certified by the Commission to City Council that Council then turned the matter over to the Redevelopment Authority for the preparation of a redevelopment proposal. This proposal was submitted to the Federal Government where the proposal was approved. The Authority then retained three firms that comprised Allegheny Planning Associates. These firms were Dieter and Ritchie, Architects of Pittsburgh, Simonds and Simonds, a landscape architectural firm also of Pittsburgh, and General Planning and Resource Consultants from St. Louis, Missouri.

These firms then made a detailed inspection of the properties and structures in the project area. In so doing,

they made a finding that the Pulakos property had sufficient structural defects to classify it as sub-standard warranting clearance. The property to the north of the subject property, and formerly owned and occupied by a White Cross Discount Store, was also designated sub-standard. Reeve testified that the Pulakos and White Cross properties, and the Fisher Building to the south (already dismantled), should in the interest of good planning be assembled as one plot to accomplish a usable disposition and redevelopment.

Again, not relying solely on its own judgment the Authority requested a transient housing study. This was done by the Real Estate Research Corp. of Chicago, who in its report of May, 1964, stated that the area along West Tenth Street at either State or Peach Streets was a suitable location for transient housing. Thus, we again have the specific area involved by an independent agency.

Again, not relying solely on its own judgment and because it was felt that the downtown project was fundamental to the economy of the City of Erie; the Authority requested the Citizens Action Committee to appoint an economic subcommittee that would concentrate on the type of re-use of the project property that would contribute to the development of the downtown economy. This committee, after reviewing the recommendations of the planning consultant (Allegheny Planning Associates) concluded that a hotel-convention facility was vitally important to the support of downtown land values.

After all this data was assembled the Authority prepared a final project report, which included the proposed acquisition of the Pulakos property. This was submitted to and approved by the Federal Government. The report was then again referred to the City Planning Commission, who by its resolution dated February 2, 1965, recommended that the plan be approved and accepted. It was then sent to City Council and approved after a public hearing. The plan was also approved by the Commonwealth of Pennsylvania and the County Planning Commission. The

approval of the Urban Renewal Plan, which included the acquisition of the subject property by every interested agency, after thorough study, in our opinion, completely negates any arbitrary or capricious action or bad faith on the part of the Authority.

The last objection raised by the owner is that the intended re-use of the property, i. e. transient housing, has no reasonable probability of fulfillment. However, at this time a binding proposal from Metropolitan Hotel Ventures for the property in question has been accepted by the Authority, and the sale has been approved by the appropriate Federal Agency. A public hearing was held by City Council on September 3, 1969 and on September 10, 1969 that body again considered matters in this regard.

While it appears that the final approval is imminent this is entirely immaterial, for the Supreme Court of Pennsylvania has held that the purpose of the Urban Redevelopment Act is the clearance, reconstruction and rehabilitation of blighted areas and that there is no requirement in the statute that a redeveloper must be chosen or that a contract be entered into with a developer for the re-use of the land as a pre-requisite to the condemnation of the property. See *Faranda Appeal*, 420 Pa. 295, 299.

The law in this regard is also fully set forth in *Belovsky v. Redevelopment Authority*, 357 Pa. 329 (1945) 339.

> "One of the objections urged against the constitutionality of the Urban Redevelopment Act is the feature of the 'redevelopment project' which contemplates the sale by the Authority of the property involved in the redevelopment, it being claimed that thereby the final result of the operation is to take property from one or more individuals and give it to another or others. Nothing, of course, is better settled than that property cannot be taken by government without the owners' consent for the mere purpose of devoting it to the private use of another, even

though there be involved in the transaction an incidental benefit to the public. But plaintiff misconceives the nature and extent of the public purpose which is the object of this legislation. That purpose, as before pointed out, is not one requiring a continuing ownership of the property as it is in the case of the Housing Authorities Law in order to carry out the full purpose of that act, but is directed solely to the clearance, reconstruction and rehabilitation of the blighted area, and after that is accomplished the public purpose is completely realized. *When, therefore, the need for public ownership has terminated, it is proper that the land be re-transferred to private ownership, subject only to such restrictions and controls as are necessary to effectuate the purposes of the Act.* It is not the object of the Statute to transfer property from one individual to another; such transfers, so far as they may actually occur, are purely incidental to the accomplishment of the real or fundamental purpose." (Emphasis ours).

Nor do we believe that the fact that the subject parcel, along with other land in the same block, was earmarked for a particular use, alters the situation. According to our interpretation of both *Faranda* and *Belovsky*, supra, even if the proposed use is ultimately not feasible, this would in no way restrict the right of the Authority to condemn and acquire the property.

We, therefore, conclude

(1) That the Downtown Erie Urban Renewal Project Area was, in fact, a blighted area.

(2) That the City Planning Commission's certification that the aforesaid area was blighted was not arbitrary.

(3) That the Redevelopment Authority of the City of Erie was not arbitrary in designating the property owned by Achilles C. Pulakos and located at 926 State Street, Erie, Pennsylvania, for acquisition or in condemning the said property.

(4) That the Urban Redevelopment Law of Pennsylvania does not require the execution of a contract with a redeveloper prior to condemnation or acquisition.

ORDER

And now, to-wit, this 11th day of September, 1969, for the reasons set forth above, the preliminary objections of the owner, Achilles C. Pulakos, are dismissed.

EDWARD H. CARNEY, P. J.

APPENDIX B

OPINION OF THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

FILED: July 2, 1970

EAGEN, J.

In this condemnation case, the condemnee filed preliminary objections to the declaration of taking which were overruled in the court below on September 11, 1969. On October 21st, the condemnee filed a petition with the court to open, vacate and set aside its order of September 11th, and to grant a re-hearing. This petition was denied on October 23rd. The instant appeal was filed on October 28th. It will be quashed.

The Eminent Domain Code, Act of June 22, 1964, Spec. Sess., P.L. 84, Art. V. §523, 26 P.S. §1-523 (Supp. 1970), provides for an appeal "to the Supreme or Superior Court as the case may be, from any order or judgment of the court of common pleas *within 45 days from the entry thereof.*" (Emphasis added.)

Since the court below did not grant a stay of proceedings in connection with condemnee's petition of October 21st, the running of the time for taking an appeal was not postponed: *Francis v. Brashear School District*, 435 Pa. 589, 258 A. 2d 509 (1969); *Erie v. Piece of Land*, 341 Pa. 310, 17 A. 2d 399 (1941). Hence, the time provided by the Code for taking the present appeal began to run on September 12th and the 45th day thereafter was October 26th. Since this day fell on a Sunday, the final day for taking the appeal was automatically extended to Monday, October 27th. The Statutory Construction Act, Act of May 28, 1937, P. L. 1019, Art. III, §38, as amended, August 11, 1959, P.L. 691, §1, 46 P.S. §538. Cf. *Alexander Unemployment Compensation Case*, 398 Pa. 551, 159 A. 2d 689 (1960). An ap-

peal filed thereafter was untimely and the statutorily prescribed period may not be judicially extended or obviated. *Jones v. Unguriet*, 364 Pa. 200, 71 A. 2d 240 (1950).

In his brief, the appellant states that the appeal "was filed with the Supreme Court on October 23, 1969." This is incorrect. An examination of the record discloses that the signature on the appeal form was verified by affidavit dated October 23, 1969, and sometime thereafter (the record does not disclose the date), the appeal form was mailed in Erie, addressed to the Prothonotary's Office for the Western District of the Supreme Court in Pittsburgh. But, it was not received in the Prothonotary's Office until October 28th. The appeal was docketed the very same day. This is the determinative day as to when the appeal *was filed*. Cf. *Malis v. Lieberman*, 438 Pa. —, — A. 2d — (1970), and *Burdett Oxygen Co. v. I. R. Wolfe & Sons, Inc.*, 433 Pa. 291, 249 A. 2d 299 (1969).

Appeal quashed.

Mr. Justice Pomeroy concurs in the result.
Mr. Justice Roberts dissents.

APPENDIX C

STATUTORY PROVISIONS INVOLVED

Constitution, Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pennsylvania Eminent Domain Code, 26 Purdon's Pa. Stat. Ann. 1-523

> "Either party may appeal to the Supreme or Superior Court as the case may be, from any final order or judgment of the Court of Common Pleas within forty-five days from the entry thereof."

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BRIEF BY RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Pursuant to Rule 16 (A) and (B) of the Rules of the Supreme Court of the United States, Respondent requests that this Court dismiss the Petition for Writ of Certiorari for the reasons that this Court lacks jurisdiction to hear an appeal based on the jurisdictional grounds asserted in the Petition.

OPINIONS BELOW

The Opinions of the Lower Court and the Opinion of the Supreme Court of Pennsylvania are printed in Petitioner's Brief. In addition, a Petition for Reargument was presented to the Supreme Court of Pennsylvania. The Petition was denied by that Court on the 13th day of August, 1970. A copy of the Petition for Reargument and the Order of August 13, 1970 are set forth in Respondent's Appendices "A" and "B".

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). This Court lacks jurisdiction under this Section to review a State Court action quashing an appeal to the State Court, for failure of Petitioner to file the appeal to the State Court within the statutory period prescribed for the appeal, where no Federal Questions are present in the case.

QUESTIONS PRESENTED FOR REVIEW

1. Where there is no Federal Constitutional Question involved in the litigation before the State Court and the applicable appeal statute grants to Petitioner a forty-five

(45) day period in which to appeal from the decision of the Lower Court to the Pennsylvania Supreme Court, does the jurisdiction of the Supreme Court of the United States attach on appeal from the Judgment of the Pennsylvania Supreme Court quashing Petitioner's appeal, on the sole ground that the appeal was filed after the expiration of the statutory period?

2. Where the Supreme Court of Pennsylvania was fully informed by the Petitioner of the reasons for Petitioner's "late" appeal in the Petition for Reargument, was Petitioner deprived of property without due process of law or denied equal protection of the law by the denial of the Petition for Reargument and the quashing of the appeal?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are contained in the Fourteenth Amendment to the United States Constitution. The Pennsylvania statutory provision involved is the Eminent Domain Code, Act of June 22, 1964, P.L. 84, Art. V., Section 523; 26 Purdon's Pa. Stat. Ann. 1-523 providing for appeal in condemnation cases to the Supreme Court of Pennsylvania.

STATEMENT OF THE CASE

This case arises out of a condemnation proceeding instituted by Respondent for condemnation of Petitioner's sub-standard building in an area of the City of Erie which was part of an Urban Redevelopment Project. Petitioner contested Respondent's right to condemn the property. Hearings were held in the Court of Common Pleas of Erie County, Pennsylvania and evidence was taken, not only in support of Respondent's right to condemn the property, but also in support of Petitioner's position that the condemnation was illegal and improper. On September 11, 1969, the Court of Common Pleas held that Petitioner's

property was, in fact, sub-standard and that Respondent had the right to condemn it as part of the Urban Redevelopment Project involving the area in which this property was located. This Order was the final Order of the Court of Common Pleas from which Petitioner filed an untimely appeal to the Supreme Court of Pennsylvania.

The pertinent statute for appeal of the Order of the Court of Common Pleas is Section 523 of the Pennsylvania Eminent Domain Code, 26 Purdon's Pa. Stat. Ann. 1-523, which states as follows:

> "Either party may appeal to the Supreme or Superior Court, as the case may be, from any final Order or Judgment of the Court of Common Pleas within forty-five (45) days from the entry thereof."

Petitioner could have filed his appeal with the Prothonotary of the Pennsylvania Supreme Court at any time between September 12, 1969 and October 27, 1969. The Petitioner did not attempt to file his appeal until after the denial of his Petition for Rehearing in the Lower Court on October 23, 1969. The filing of the Petition for Rehearing did not prevent the filing of the appeal to the Supreme Court of Pennsylvania. Petitioner could have requested a stay of proceedings from the Lower Court during the pendency of the Petition for Rehearing before that Court, but Petitioner failed to file an appeal and failed to request a stay of proceedings.

Petitioner admits the appeal was not filed with the Prothonotary of the Supreme Court until October 28, 1969, after the statutory period for the filing of the appeal had expired.

The Pennsylvania Supreme Court quashed the appeal because Petitioner failed to file its appeal within the statutory period. Petitioner's Petition for Reargument to the Pennsylvania Supreme Court contained all the reasons which Petitioner asserted justified the "late" filing of the appeal. The Petition for Reargument was supported by affidavits. The Pennsylvania Supreme Court, which was

then fully informed by Petitioner, considered the matters raised by Petitioner and denied the Petition for Reargument, without opinion, on August 13, 1970.

At the hearings and in argument and Briefs before the Lower Court, the Petitioner failed to present any Federal Constitutional Questions. Nor did the Lower Court in its Opinion mention, discuss, or pass on any Federal Constitutional Question.

On appeal to the Supreme Court of Pennsylvania, no Federal Constitutional Questions were raised by Petitioner. In fact, Petitioner's Brief filed with that Court stated the questions to be as follows:

STATEMENT OF QUESTIONS INVOLVED

"(1) Where a specific reuse purpose is adopted by a redevelopment authority as the basis for the taking of one of two similar properties, is the taking arbitrary if such reuse purpose has no reasonable probability of fulfillment?

(Answered in the negative by the Court below.)

(2) Did the lower court abuse its discretion in refusing to grant a rehearing as to events which transpired after the close of testimony but which affect the question of arbitrariness in the condemnation of Owner's property?

(Not answered in the Court below.)

(3) May this court exercise its broad power of review of a final order of the court below which was not reviewed by a court en banc and where the finding of fact, inferences and conclusions of law as they pertain to a finding of blight are not supported by adequate evidence?

(Not answered by the Court below.")

The Opinion of the Pennsylvania Supreme Court does not mention, discuss or pass upon any Federal Constitutional Questions.

Federal Constitutional Questions are presented by Petitioner to this Court for the first time and are based *solely* on the action of the Supreme Court of Pennsylvania in quashing Petitioner's appeal on the ground that it was not filed within the requisite statutory period.

REASONS FOR DENIAL OF WRIT

This Court does not have jurisdiction to consider an appeal on the grounds raised in the Petition for Writ of Certiorari. Petitioner raised no Federal Constitutional issues with respect to the validity of the Pennsylvania Eminent Domain Code or of Respondent's activities thereunder. Petitioner's sole ground for appeal to this Court to review the decision of the Pennsylvania Supreme Court appears to be based on Petitioner's contention that this Court is required to review the statutory and procedural requirements requisite to the filing of an appeal in the State Court, when, admittedly, Petitioner failed to comply with these requirements. It is apparent from a review of the Petition for Writ of Certiorari that no Federal Constitutional Question was ever raised by Petitioner in the State Court proceedings.

This Court from its inception has adhered to the principle that it will not review judgments of State Courts which rest on adequate, independent, non-Federal, State grounds. This doctrine is clearly enunciated in the case of *Herb. v. Pittcairn*, 65 S. Ct. 459 (1945); 324 U. S. 117; 89 L. Ed. 789 where on 65 S. Ct. 463 (324 U. S. 125) this Court states:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. Murdock v. Memphis, 20 Wall. 590, 636, 22 L. Ed. 429; Berea College v. Kentucky, 211 U. S.

45, 53, 29 S. Ct. 33, 34, 53 L. Ed. 81; Enterprise Irrigation District v. Farmers' Mutual Canal Co. 243 U. S. 157, 164, 37 S. Ct. 318, 320, 61 L. Ed. 644; Fox Film Corp. v. Muller, 296 U. S. 207, 56 S. Ct. 183, 80 L. Ed. 158. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."

See also *Milk Drivers Union of Chicago, Local 753 et al. v. Meadowbrook Dairies, Inc.* (1941) 61 S. Ct. 552, 312 U. S. 287, 85 L. Ed. 836; *U. S. v. Pink* (1942) 62 S. Ct. 552, 315 U. S. 203; 86 L. Ed. 796; *Dixon v. Duffy* (1951) 72 S. Ct. 10, 342 U. S. 33, 96 L. Ed. 46; *Hammerstein v. Superior Court of California* (1951) 71 S. Ct. 521, 340 U. S. 622, 95 L. Ed. 586; *Henry v. State of Mississippi* (1965) 85 S. Ct. 564, 379 U. S. 443, 13 L. Ed. 2d 408.

In *Williamson v. Hopewell Redevelopment and Housing Authority* (1963) 83 S. Ct. 315, 371 U. S. 234, 9 L. Ed. 2d. 495, the Court dismissed for lack of a substantial Federal Question, a property owner's objections to the procedural aspects of the Virginia Eminent Domain Code.

Petitioner herein presented no Federal or State Constitutional issue with respect to the reasonableness of the requirement of the Pennsylvania Eminent Domain Code providing for a forty-five (45) day appeal period. Petitioner's sole ground for review is the failure of the Supreme Court of Pennsylvania to allow the appeal from the Court of Common Pleas of Erie County, Pennsylvania after the statutory period for filing the appeal had expired.

The decision of the Pennsylvania Supreme Court on Petitioner's appeal to that Court was in conformity with all of its past decisions regarding the failure of a party to conform with a statutory appeal period. The Supreme Court of Pennsylvania has held on numerous occasions that "it is without the power to enlarge or extend the time

provided by statute for the taking of appeal." *Commonwealth v. Bey*, 437 Pa. 134, 262 A. 2d 144 (1970); *Commonwealth v. Simon*, 413 Pa. 609, 198 A. 2d 583 (1964) and *Commonwealth v. Mackley*, 380 Pa. 70, 110 A. 2d 172 (1955).

There are some extraordinary situations in which the Supreme Court of Pennsylvania has allowed an appeal after the statutory period for the filing of the appeal had apparently expired. Only where fraud is involved, or there has been a breakdown in the Court's operation through a default of the Court's officers, where the party filing the appeal has been misled by such a default, will an appeal be permitted after the expiration of the statutory period. The rationale of these decisions is that the statutory period for the filing of the appeal would not begin to run until the date on which Appellant or his counsel received from the Court the notice of the order or judgment from which the appeal would lie. The Court cannot extend the statutory period itself.

In *Nixon v. Nixon*, 329 Pa. 256, 198 A. 154, (1938), upon which Petitioner relies heavily, the Appellant did not appeal to the Pennsylvania Supreme Court within the forty-five (45) day statutory period because the Clerk of the Superior Court failed to notify the Appellant of the decision of that Court. In permitting the appeal under these circumstances, the Supreme Court of Pennsylvania had the following to say on page 259 of its Opinion:

> "An Appellant is barred by the lapse of more than forty-five days between the judgment of the Superior Court and the filing of the petition for an allowance of appeal otherwise there would be no finality to judicial action. See Platt-Barber Co. v. Groves, supra; Harris v. Mercur (No. 1), 202 Pa. 313; Wise v. Cambridge Springs Borough, 262 Pa. 139; Jordan v. Eisele, 273 Pa. 95; Miller & Sons' Co. v. Mt. Lebanon Township (No. 2), 309 Pa. 221; Marcus v. Cohen 94 Pa. Super. Ct. 383. But, as this Court has indicated, the legislative purpose is not to foreclose a party who

satisfactorily explains his delay. However, the occasion must be *extraordinary* and must involve fraud or some breakdown in the court's operation through a default of its officers, whereby the party has been injured. There can be no extension of time as a matter of indulgence; Schrenkeisen v. Kishbaugh, 162 Pa. 45, 48. Such excuses as a client's illness (Marcus v. Cohen, supra), *or neglect of an attorney* (Ward v. Letzkus, 152 Pa. 318: Wise v. Cambridge Springs Borough, supra at p. 144) are insufficient. Fraud, on the other hand (Ziegler's Petition, 207 Pa. 131; York County v. Thompson, 212 Pa. 561) or its equivalent, "the wrongful or negligent act of a court official" (Singer v. Del. L. & W. R. R. Co., 254 Pa. 502, 505) may be a proper reason for holding that, as to the injured person, the statutory period does not run and that the wrong may be corrected by means of a petition filed nunc pro tunc within a reasonable time. As was stated in Horn v. Lehigh Valley R. R. Co., 274 Pa. 42, 44, in reference to a statute limiting claims for workmen's compensation: "While the governing sections are mandatory . . . we have held, where a party has been prevented from doing an act through fraud or circumstances that amount to fraud, the court might extend the time within which to do the act: . . ." And in Schwartz Bros. v. Adams Express Co., 75 Pa. Super. Ct. 402 403, it was said: "Where a party has been prevented from appealing by fraud or by the ignorance or negligent act of a court official, it has been held that the court has power to extend the time for taking an appeal." (Emphasis supplied)

In *Ward v. Letzkus*, 153 Pa. 318, 25 A. 778 (1893) and *Wise v. Cambridge Springs Borough*, 262 Pa. 139, 104 A. 863 (1918), cited in Nixon, counsel for the Appellant failed to file the appeal within the statutory period and in both cases, the Supreme Court of Pennsylvania refused to permit the late appeal.

In the very recent case of *Commonwealth v. Bey*, 437 Pa. 134 198 A. 2d 134 (1970), the District Attorney appealed a decision of the Lower Court after the expiration of the statutory appeal period. In quashing the appeal, the Court stated on page 137 of its Opinion:

> "We are without the power to enlarge or extend the time provided by statute for taking an appeal or to grant leave to file an appeal nunc pro tunc. See: Commonwealth v. Simon, 413 Pa. 609, 610-11, 198 A. 2d 583 (1964); Commonwealth v. Mackley 380 Pa. 70, 73, 110 A. 2d 172 (1955). See also: 4 Am. Jr. 2nd Appeal and Error §§292, 293 (1962); 9 Standard Pennsylvania Practice (Rev'd) §25 (1962). Neither the parties, by agreement, nor the Court, by acquiescense, can extend its jurisdiction."

II. In the Petition for Reargument, Petitioner discusses all of the reasons why the appeal was filed after the statutory period had expired and the circumstances under which the appeal was filed. After consideration of the Petition for Reargument, the Supreme Court of Pennsylvania, on August 13, 1970, affirmed its decision, quashing the appeal. Petitioner's contention that the Supreme Court of Pennsylvania failed to consider the circumstances under which the appeal was filed is without merit.

CONCLUSION

For the foregoing reasons, Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

QUINN, PLATE, GENT, BUSEK & LEEMHUIS

JOHN G. GENT, Esquire
JOHN M. QUINN, Esquire

APPENDIX "A"

IN THE
SUPREME COURT OF PENNSYLVANIA
Western District

PETITION FOR REARGUMENT AND/OR LEAVE TO APPEAL OCTOBER 27, 1969, NUNC PRO TUNC

To the Honorable, the Justices of said Court.

The petition of Achilles C. Pulakos, appellant, in the above case, by his attorneys, Knox, Graham, Pearson & McLaughlin, respectfully prays your Honorable Court to grant him a rehearing and/or leave to appeal nunc pro tunc for the following reasons:

FACTS

1. On July 2, 1970, by Opinion and Order of this Court, Appellant's appeal was quashed because it was untimely filed. A copy of the Opinion is attached hereto as Exhibit A.

2. Appellant had 45 days within which to appeal the adverse decision of the lower court on his preliminary objections to a condemnation proceeding. Eminent Domain Code, Act of June 22, 1964, Spec. Sess., P.L. 84, Art. V, Sec. 523, 26 P.S. Sec. 1 - 523 (Supp. 1970).

3. The Order of the lower court dismissing preliminary objections to the condemnation was entered September 11, 1969. Consequently, Appellant's time for appeal expired October 26, 1969, but since that day was a Sunday, the time was extended to October 27, 1969, by virtue of the Statutory Construction Act, act of May 28, 1937, P.L. 1019,

Art. III, Sec. 38, as amended, August 11, 1959, P.L. 691, Sec. 1, 46 P.S., Sec. 538.

4. The records of the Prothonotary for the Western District of the Supreme Court indicate that the appeal was docketed October 28, 1969, one day after the appeal time had elapsed.

5. At page 2 of the Opinion by Mr. Justice Eagen, this Court recites, "that the signature on the appeal form was verified by affidavit dated October 23, 1969, and sometime thereafter (the record does not disclose the date), the appeal form was mailed in Erie, addressed to the Prothonotary's Office for the Western District of the Supreme Court in Pittsburgh. But it was not received in the Prothonotary's office until October 28th."

6. The appeal form was in fact mailed from Erie to the Prothonotary at Pittsburgh on October 23, 1969, the same date as that set forth in the affidavit to the appeal form.

7. On October 23, 1969, the lower court denied Appellant's petition for a rehearing. Mr. Edwin L. R. McKean, attorney for Appellant, immediately and on that same day dictated the appeal form and transmittal letter to Mrs. Gertrude Miodus, Secretary. Mrs. Miodus prepared the appeal form and transmittal letter and after the signature of Appellant was obtained, attached the necessary postage and placed the letter, marked "Certified Mail," into the day's outgoing mail. Affidavits of Mr. McKean and Mrs. Miodus are attached hereto as Exhibits B and C respectively. Copies of the appeal form, transmittal letter and certified mail file receipt are attached hereto as Exhibits D, E and F respectively.

8. Appellant is informed by Postal authorities at Erie that the letter would have left Erie on Star Route truck service to Pittsburgh at 9:00 P.M. the evening of the 23rd of October and arrived in Pittsburgh at 1:45 A.M. the morning of the 24th of October. The truck was on time. Postal authorities also informed Appellant that

there are four truck shipments and one air taxi shipment to Pittsburgh daily.

9. Postal authorities at Pittsburgh inform Appellant that under normal circumstances a certified letter arriving in Pittsburgh at 1:45 A.M. would be delivered the same day (October 24th) and no later than Monday, October 27th.

10. In fact, the letter was not delivered until Tuesday, October 28, 1969, one day after the time for appeal had elapsed. The return receipt is attached hereto as Exhibit G. Please note that the same code number, 33751, is printed on both the return receipt, Exhibit G, and on the file mailing receipt retained by Appellant's counsel, Exhibit F.

11. Postal authorities and Appellant have no explanation for the delay in delivery. United States Mail Carrier, No. 1960, Mr. James Williamson, who regularly delivers mail to the Prothonotary, and who delivered Appellant's certified letter on this occasion, has informed Appellant's counsel that on infrequent occasions a piece of certified mail may be mis-sorted into third and fourth class mail and remain undetected for several days. The Post Office would have no record of such an occurrence.

12. Normal mail delivery between Erie and Pittsburgh is overnight. This is shown by reference to Exhibit H, a letter from the Prothonotary to Appellant's counsel dated October 28, 1969 containing the writ of certiorari and requesting the return of a praecipe for appearance, and Exhibit I, the response letter of Appellant's counsel returning the praecipe under date of October 29, 1969, and the receipt of the Prothonotary for Erie County evidencing filing the writ of certiorari on October 29, 1969, Exhibit J.

ARGUMENT

Erie, Pennsylvania is approximately 130 miles from the office of the Prothonotary at Pittsburgh and it is approximately a three hour drive one way. The only way Appellant's counsel could have guaranteed the arrival

of the appeal form would have been to drive or fly to Pittsburgh and personally enter the appeal with the Prothonotary. Such a requirement would be burdensome and expensive for the client. Attorneys in outlying areas to Philadelphia, Harrisburg and Pittsburgh, therefore, must depend upon the mails for the filing of appeal papers.

The Supreme Court of Pennsylvania must have recognized the plight of attorneys and clients in outlying areas with respect to the filing of legal papers when it promulgated the Pennsylvania Rules of Civil Procedure. For example, the Letter of December 1, 1967 from the Chief Justice to all Pennsylvania Judges annexed to Supreme Court Rule 14 recited in part "An out of county attorney may not thereafter be required to appear personally or through local counsel in order to file any papers in the local courts or in any of the aforesaid offices, but may do so by mail. An out of county attorney may be served by mail at his address within the Commonwealth."

Appellant believes that it is reasonable to assume that a certified letter mailed to Pittsburgh from Erie, a distance of 130 miles, will arrive at its ultimate destination within four days where normal service is overnight. Appellant argues that the unanticipated delay in arrival of the appeal form at the Prothonotary's office where the form was mailed well within normal delivery time is a circumstance beyond his control and such an extraordinary circumstance that appeal should be permitted nunc pro tunc. In *Nixon v. Nixon*, 329 Pa. 256 (1938) at page 259 this Court said:

> "An Appellant is barred by the lapse of more than forty-five days between the judgment of the Superior Court and the filing of a petition for an allowance of appeal; otherwise there would be no finality to judicial action . . . but, as this Court has indicated, the legislative purpose is not to foreclose a party who satisfactorily explains his delay."

It is true that *Nixon* involved an oversight on the part of the Prothonotary. Nevertheless, the case does stand

for the proposition that an appellant should not suffer for circumstances over which he has no control. In *Nixon*, an attorney depended upon the "custom" of the Prothonotary in mailing notices even though no rule of court required such mailing. The court stated at pages 261 and 262 of the *Nixon* opinion that:

> "Neither appellant nor his counsel knew, nor had any reason to believe, there had been a mistake in the Prothonotary's Office. Under the circumstances they were entitled to expect this notice. The Harrisburg District is composed of twelve counties, and the opinions on cases arising there are handed down at various places at which the court sits, usually cities other than Harrisburg. Counsel lives in Adams County and it would impose too great a burden to require him to daily inform himself by telephone. Appellant through his attorney, was lulled into security by this practice, and his failure to receive such notice is sufficient reason for us to hold that appellant should be permitted an appeal. To hold otherwise would work a grave injustice."

Appellant believes that to require the personal delivery of papers to the Prothonotary's office, which is the effect of the Court's Opinion in this case, would impose the same intolerable burden on attorneys in outlying areas as in *Nixon* and that to refuse an appellant an appeal would work a similar injustice.

A similar situation involving late mail confronted the Court in *Johnson v. Esso Standard Oil Co.*, 181 Fed. Supp. 431, D. C. 1960. In that case the Court held that delay in the mails of one day over which the party had no control should not bar an action as the result of the Statute of Limitations.

Appellant further argues that to deny an appellant a decision on the merits in this case under the circumstances wherein the delay in the delivery of the appeal form was one day is such an injustice as to deprive Appel-

lant of the equal protection of the laws and is a deprivation of property without due process of law in contravention of the Constitutions of both the Commonwealth of Pennsylvania and the United States of America.

CONCLUSION

Appellant respectfully prays your Honorable Court to enter an appeal October 27, 1969 nunc pro tunc and to grant a rehearing in this case.

Respectfully submitted,

KNOX, GRAHAM,
PEARSON & McLAUGHLIN

By /s/ WILLIAM W. KNOX
/s/ EDWIN L. R. McKEAN

AFFIDAVIT

Commonwealth of Pennsylvania)
) ss.
County of Erie)

I, EDWIN L. R. McKEAN, attorney for Appellant in the case of *The Redevelopment Authority of the City of Erie v. Achilles C. Pulakos*, No. 36 March 1970, make the following affidavit:

I recall dictating to Gertrude Miodus, secretary, on October 23, 1969, the appeal form in this case and the transmittal letter to the Prothonotary of the Supreme Court of Pennsylvania, Western District, at Pittsburgh, Pennsylvania. I recall further that on the same day I secured the affidavit of the Appellant to the appeal form, attached my signature to the transmittal letter and requested Gertrude Miodus to mail the letter and appeal form, certified mail, on the same date.

I recall the circumstances of this transaction for the reason that the dictation and mailing was accomplished on the same day that the lower court dismissed Appellant's petition for rehearing.

/s/ EDWIN L. R. McKEAN

AND NOW, to-wit, this 9th day of July, 1970, in and for said county and state, personally appeared Edwin L. R. McKean, who being satisfactorily known to me, a Notary Public, swears that the above facts are true and correct to the best of his knowledge, information and belief.

/s/ EDWIN L. R. McKEAN

Sworn to and subscribed before me
this 9th day of July, 1970.

/s/ HELENA SETTINO

Helena Settino,
Notary Public, Erie, Erie County.
My Commission Expires Aug. 2, 1971.

AFFIDAVIT

Commonwealth of Pennsylvania)
) ss.
County of Erie)

I, GERTRUDE MIODUS, secretary to the law firm of Knox, Graham, Pearson and McLaughlin, make the following affidavit:

I recall preparing on October 23, 1969, an appeal form to the Supreme Court of Pennsylvania in the case of *The Redevelopment Authority of the City of Erie v. Achilles C. Pulakos*, No. 36 March 1970, a transmittal letter to the Prothonotary of The Supreme Court of Pennsylvania, Western District, at Pittsburgh, Pennsylvania, a certified mail receipt for the file and for delivery. I also recall that on the same date I inserted the documents in the mailing envelope and attached the certified mail receipt and the necessary postage and deposited the envelope into the outgoing mail basket for the day.

I recall the circumstances surrounding this particular mailing because of the urgency of the matter and the fact that I have not prepared an appeal form to the Supreme Court of Pennsylvania on any occasion prior or subsequent to October 23, 1969.

/s/ GERTRUDE MIODUS

AND NOW, to-wit, this 9th day of July, 1970, in and for said county and state, personally appeared Gertrude Miodus, who being satisfactorily known to me, a Notary Public, swears that the above facts are true and correct to the best of her knowledge, information and belief.

/s/ GERTRUDE MIODUS

Sworn to and subscribed before me
this 9th day of July, 1970.
/s/ HELENA SETTINO

Helena Settino,
Notary Public, Erie, Erie County.
My Commission Expires Aug. 2, 1971.

In the Supreme Court of Pennsylvania

WESTERN DISTRICT

IN REM PROCEEDINGS
In re: Premises commonly known as 926 State Street, City Index No. 3005-101, and LPA Parcel No. 31-7, situate in the City of Erie, County of Erie and Commonwealth of Pennsylvania

REDEVELOPMENT AUTHORITY OF THE CITY OF ERIE

- vs -

OWNERS OR PARTIES IN INTEREST ACHILLES C. PULAKOS

COURT OF COMMON PLEAS

County of ERIE

No. 1121 A Term, 19 68

Nature of Case (See Note)

Enter Appeal on behalf of OWNERS OR PARTIES IN INTEREST ACHILLES C. PULAKOS

from the Judgement of the Court of Common Pleas

of the County of Erie at the above number and term.

KNOX, GRAHAM, PEARSON & McLAUGHLIN

To PATRICK N. BOLSINGER,
Prothonotary of the Supreme Court of Pennsylvania,
For the Western District

By _____
Attorneys for Appellant

SEND ALL NOTICES TO
Edwin L. R. McKean Esq.
(Address) 23 West 10th Street
Erie, Pennsylvania 16501

County of Erie ss:

Achilles C. Pulakos being duly sworn, says that the above Appeal is not intended for delay but because Appellant believes he has suffered injustice by the judgement from which he appeals.

Sworn and subscribed before me this 23rd day of October A. D. 1969

_____

_____

18 Appeal

NOTE:—This space is to be filled in only if the case is in one of the following classes:
(1) Felonious Homicide.
(2) Mandamus.
(3) Quo Warranto.
(4) Preliminary injunction.
(5) Decree requiring an account—Appeal pursuant to Act of March 30, 1921, P. L. 60
(6) Question of Jurisdiction—Appeal pursuant to Act of March 5, 1925, P. L. 23.

October 23, 1969

Edwin L. R. McKean

Patrick M. Boisinger
Prothonotary of the Supreme Court
of Pennsylvania
Western District
801 City County Building
Pittsburgh, Pennsylvania 15219

Re: Redevelopment Authority of the City of Erie v. Pulakos
Court of Common Pleas of Erie County, No. 1121 A 1968

Dear Sir:

Enclosed herewith please find Appeal and Affidavit to the Supreme Court of Pennsylvania in the above captioned matter and our check in the amount of $12.00 drawn to your order.

Yours very truly,

KNOX, GRAHAM, PEARSON & McLAUGHLIN

By _____
Edwin L. R. McKean

ELRM:gm

Enclosures

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Certified Mail Receipt

RECEIPT FOR CERTIFIED MAIL—30¢

No. 331751

SENT TO
Patrick N. Bolsinger, Prothonotary

STREET AND NO.
of the Supreme Ct. of Pa., Western

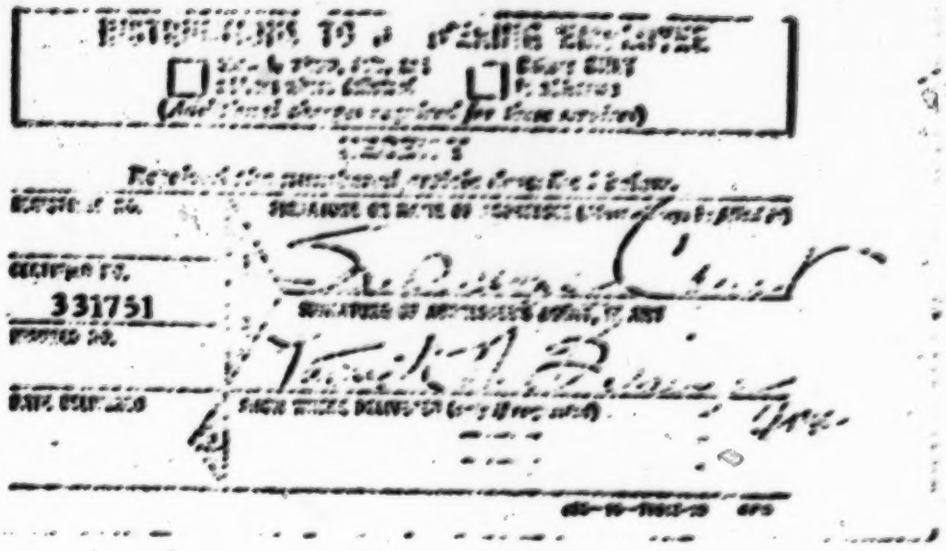
P. O., STATE, AND ZIP CODE
District
801 City County Bldg., Pitts. Pa.

POSTMARK OR DATE
10-23-69

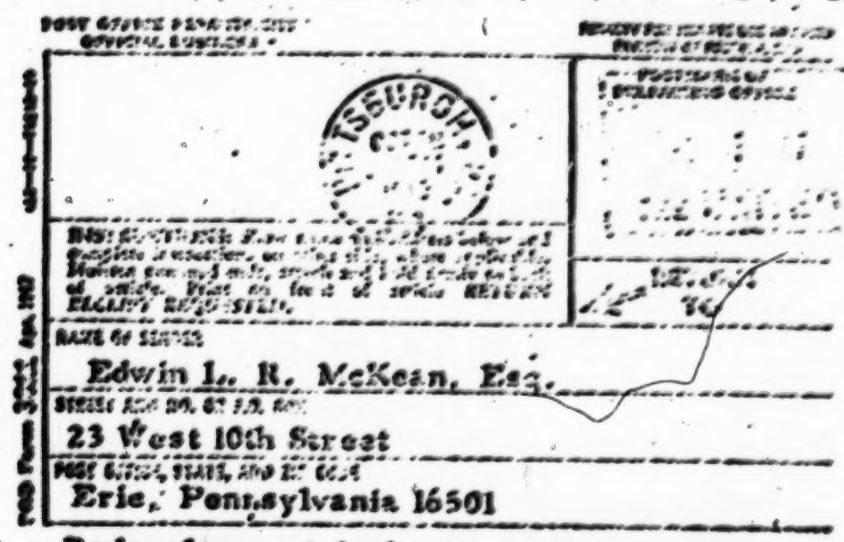
EXTRA SERVICES FOR ADDITIONAL FEES
Return Receipt
Shows to whom and date delivered ☐ 10¢ fee
Shows to whom, date, and where delivered ☐ 25¢ fee
Deliver Addressee Only ☐ 50¢ fee
1521

POD Form 3800 Rev. 1966 NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL (See other side)

Certified Mail Signed Receipt



331751



(Redevelopment Authority of Erie v. Pulakos)

The Supreme Court of Pennsylvania
Western District

PATRICK N. BOLSINGER
PROTHONOTARY
HELEN D. STEELE
DEPUTY PROTHONOTARY

PITTSBURGH, PA.
15219

October 28, 1969

Edwin L. R. McKean, Esq.
23 West 10th Street
Erie, Pa. 16501

Re: Redevelopment Authority v. Owners, et al.
No. 36 March Term, 1970

Dear Mr. McKean:

This will acknowledge receipt of your letter of October 23, enclosing appeal and affidavit in the above-entitled matter together with your check for $12.00. I am enclosing a receipt for your check in payment of the filing fee.

The appeal has been entered in the Supreme Court at the above number and term and will be listed for argument at the session commencing in Pittsburgh on March 16, 1970.

I am enclosing herewith writ of certiorari, for filing in the office of the Court of Common Pleas of Erie County. Please advise me what division of the Court is involved. I also enclose form of notice of appeal which should be served on opposing counsel in accordance with the requirements of Rule 63 and filed in the court below. When you are serving this notice, will you also ask opposing counsel to sign the enclosed praecipe for appearance and return it to this office as promptly as possible.

If the Judge of the court below has not filed an opinion, it will be necessary under Rule 63 to serve him with notice of appeal, and if the official transcript of the testimony has not been filed, notice must also be served on the stenographer who took the testimony. Forms for this purpose will be furnished upon request and acceptance of service of these notices should also be filed in the court below.

Very truly yours,

Helen D. Steele

DEPUTY PROTHONOTARY

HS:ad
Enclosures

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Letter

October 29, 1969

Edwin L. R. McKean

Helen P. Nicely
Deputy Prothonotary
The Supreme Court of Pennsylvania
Western District
Pittsburgh, Pennsylvania 15219

Re: Redevelopment Authority v. Owners, et al
No. 36 March Term, 1970

Dear Madam:

Enclosed herewith please find Appellee's Praecipe for Appearance executed by Mr. John M. Quinn, Esquire, Counsel for Appellee. The Court Term and number for the case below is 1121 A-1968, Civil Division. The Judge of the Court below has filed an Opinion. The official transcript of the testimony has been filed.

Yours very truly,

KNOX, GRAHAM, PEARSON & MCLAUGHLIN

BY _____
Edwin L. R. McKean

ELRM/jmt

Enclosure

Receipt

No.

PROTHONOTARY
ERIE COUNTY

Date 10/29/67

Received of Edwin McKean $20.00

For Certiorari
No. 1121 - G - 67
In Re: Archibald C. Gulotta

Co. Fee 20.00

M. Buzzigoli
Dep. Prothonotary

APPENDIX "B"

Letter

COPY

The Supreme Court of Pennsylvania

Western District

PATRICK N. BOLSINGER
PROTHONOTARY
HELEN D. STEELE
DEPUTY PROTHONOTARY

August 17, 1970

Edwin L. R. McKean, Esq.
23 West Tenth Street
Erie, Pa. 16501

Re: Redevelopment Authority v. Owners
No. 36 March Term, 1970

Dear Mr. McKean:

This is to advise you that the Court has entered the following Order on the petition for reargument in the above-captioned matter:

"August 13, 1970

Denied.

BY THE COURT"

Very truly yours,

Helen D. Steele

DEPUTY PROTHONOTARY

HS:ad
cc: John M. Quinn, Esq.